IN THE
MISSOURI SUPREME COURT

MARCELLUS WILLIAMS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 86095
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 11
THE HONORABLE EMMETT O'BRIEN, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL AND FACT STATEMENT

Appellant incorporates the jurisdictional statement and Statement of Facts from his original brief.

ARGUMENT

I. Prosecutorial Misconduct:

A. A prosecutor's open file policy does not excuse nondisclosure of exculpatory material, since a prosecutor must disclose not only the exculpatory material that he personally possesses, but any favorable evidence known to others acting on the government's behalf, including the police;

B. the amended motion did not make a general allegation that the State had failed to disclose exculpatory information, but included specific allegations that the State:

1. concealed the whereabouts of Cole and Asaro so that counsel could not effectively investigate and discover exculpatory evidence;

2. failed to disclose Cole and Asaro's drug treatment, mental health, prison and jail records; and

3. provided incriminating details of the crime to John Duncan and Kimber Edwards, offering them inducements and benefits for testimony that Mr. Williams confessed, calling into question the truthfulness of the State's paid informants who testified at trial; and

C. Mr. Williams and his counsel relied on the prosecutor to disclose all exculpatory information, thus, this claim could not have been raised on direct appeal.

A. The Prosecutor's Open File Policy Did Not Excuse Nondisclosure of Exculpatory Material

The State maintains that since the prosecutor had an "open file" policy and gave the defense everything he actually "possessed" in his file, there could be no *Brady*[1] violation(Resp.Br.27-28,33,34-35,37). The Supreme Court has flatly rejected this argument. In *Strickler v. Greene*, 527 U.S. 263, 275-76(1999), the State of Virginia argued that the prosecutor had opened his file to Strickler and thus complied with his duty to disclose material favorable to the defense. *Id*. at 275, n. 11. The prosecutor swore:

> I disclosed my entire prosecution file to Strickler's defense counsel prior to Strickler's trial by allowing him to inspect my entire prosecution file, including, but not limited to, all police reports in the file and all witness statements in the file.

Id. at 276, n. 13. However, the file did not include material that would have impeached one of the State's eyewitnesses to the abduction. *Id*. at 275, n. 12. Apparently, the investigating police department had not turned over the material to the prosecutor. *Id*. "The prosecutor is responsible for 'any favorable evidence known to the others acting on the government's behalf in the case, including the police.'" *Id. quoting, Kyles v. Whitley*, 514 U.S. 419, 437(1995). Thus, the State is charged with knowledge of the impeaching materials for purposes of *Brady*,

[1] *Brady v. Maryland*, 373 U.S. 83, 86-89(1963).

whether the documents are in the prosecutor's file or in his actual possession. *Strickler, supra* at 275, n. 12.

Consistent with *Strickler*, courts have found *Brady* violations by the St. Louis County Prosecutor where the State provided items in his file, but not those possessed by other entities, such as the police. *See, e.g. Reasonover v. Washington*, 60 F.Supp.2d 937, 973(E.D.Mo.1999)(since police investigators created a tape of Reasonover's conversation with an informant, the prosecutor had a duty to find it and disclose the exculpatory information).

Similarly, in *State v. Childers*, 852 S.W.2d 390, 391(Mo.App.E.D.1993), the prosecutor had opened his file to defense counsel, giving him all the material in his actual possession. On the day of trial, the prosecutor presented security guards' reports that included Childers' statement, asking the officer to "give me a break." *Id*. The prosecutor said he did not receive this material until the day before trial. *Id*. The Court rejected such an excuse, saying "[f]ailure to gain actual possession of evidence, by itself, does not justify the failure to inform the defendant of the intent to use material evidence at trial." *Id., quoting State v. Whitfield*, 837 S.W.2d 503(Mo.banc1992). The State could have obtained the information from the security guard had he requested it. *Childers, supra*. The prosecutor had a duty to obtain this evidence and disclose it prior to trial, so that the defense would have an opportunity to prepare his defense. *Id*. at 392.

In *State v. Carlisle*, 995 S.W.2d 518, 520(Mo.App.E.D.1999), a St. Louis County Prosecutor failed to disclose defendant's written confession until the

morning of trial. The prosecutor claimed that she did not know about the written confession until that morning. *Id*. The Court agreed that the nondisclosure was improper and was not excused by the prosecutor's lack of knowledge or lack of possession of the evidence. *Id*. However, the trial court granted a one-half day recess, providing an adequate remedy. *Id*. at 521-22.

The prosecutor's duty to disclose records in others' possession is not limited to items held by police. This Court has applied the duty to mental health records. *State v. Robinson*, 835 S.W.2d 303, 306-07(Mo.banc1992). The duty has been extended to a state witness' criminal and penitentiary records. *Crivins v. Roth*, 172 F.3d 991, 996(7thCir.1999); *Carriger v. Stewart*, 132 F.3d 463, 479-82 (9thCir.1997). Even though Mr. Williams relied on these cases in his opening brief, the State fails to acknowledge them.

Given *Strickler* and all the foregoing cases, the prosecution did not satisfy *Brady*, by opening his file and providing those items that he actually possessed.

B. <u>The Amended Motion Made Specific, Not General Allegations</u>

The State argues that the motion court properly denied Mr. Williams an evidentiary hearing, because his *Brady* claims were conclusory and general, not factually specific(Resp.Br.31,36,38-39). The State cites *State v. Brooks*, 960 S.W.2d 479, 500(Mo.banc1997)(Resp.Br.38). In *Brooks*, the amended motion alleged that "the state had in its possession material, exculpatory evidence that the state failed to turn over to the defense." *Id*. This speculative and conclusional claim was a general allegation and did not warrant an evidentiary hearing or

disclosure of the State's entire file. *Id*. Mr. Williams' claims were nothing like those rejected in *Brooks*.

1. <u>Concealing State Witnesses and Impeaching Evidence</u>

Here, the amended motion made specific factual allegations that the prosecutor, Keith Larner, concealed the whereabouts of Henry Cole and Laura Asaro to thwart defense counsel's ability to prepare for trial(L.F.72-73,94-108).[2] He pretended that the witnesses were hard to find, even though he and the police were in regular contact with both of them(L.F.95-97,99,102). When defense counsel complained in open court that he could not locate or investigate these witnesses, the prosecutor did not reveal their whereabouts (L.F.98-99,Tr.30-31). Rather, he did everything possible to hide them. *Id*.

The motion specifically alleged how Larner tried to hide Asaro from defense counsel so she could not be subpoenaed for a deposition in Williams' robbery case, used as an aggravating circumstance(L.F.103-04). Larner met with the witness, whisked her away in a cab in front of the St. Louis County Justice Center, and tried to prevent counsel and her investigator from serving Asaro with a subpoena(L.F.103-04). Larner had interviewed Asaro three times in that case, but told the court he was unable to find her(L.F.98). The State does not even address these specific factual allegations in its brief.

[2] Alternative claims of ineffective assistance relating to Cole and Asaro are raised in Points II and III.

2. Failure to Disclose Cole and Asaro's Drug Treatment, Mental Health, Prison and Jail Records

The amended motion's allegations regarding witness records were also specific(L.F.114-21). Shortly before trial, doctors treated Cole at a mental hospital and prescribed him psychiatric medication(L.F.115-116). The motion specified Cole' drug use and treatment at St. Luke's Hospital, CMC on Delmar, Department of Corrections at Farmington, St. Louis City Workhouse, Roosevelt Hospital in New York and Interfaith Hospital in Brooklyn, New York (L.F.116). In his pretrial deposition, Cole admitted using drugs, including crack cocaine, marijuana, heroin and PCP(L.F.142). Cole had hallucinated and lost his memory because of drug use and drinking binges(L.F.117). Larner would not disclose these records, and instructed Cole not to sign a release for them(L.F.114).

Cole had at least twelve prior convictions, and had provided testimony while in prison(L.F.117), but the State would not disclose any of Cole's jail or prison records(D.L.F.471,Tr.136).

Like Cole, Asaro received treatment at mental facilities, including stays at St. Louis Empowerment Center, New Beginnings, Queen of Peace and Booneville Treatment Center for Women(L.F.117-18). She applied for disability benefits due to her mental problems(L.F.118). A judge ordered drug treatment at New Beginnings shortly before trial when she was deposed(L.F.118). Yet the State did not disclose any of her records.

3. The State Provided Incriminating Details of the Crime to Inmate Witnesses, Offering Them Benefits for Testimony that Mr. Williams Confessed

The amended motion specifically alleged that the State gave Duncan and Edwards incriminating information about the crime and then offered them benefits if they would testify against Mr. Williams(L.F.73-74,108-14). The prosecutor's investigator, Ed Magee, interviewed Duncan and gave him incriminating details about the crime(L.F.109). Magee then asked Duncan if Mr. Williams had discussed the crime with him(L.F.109-10). Magee said they could reduce Duncan's sentence if he provided information against Mr. Williams(L.F.110). Similarly, police provided Edwards[3] facts about the murder and then asked him if Mr. Williams had confessed(L.F.111). They promised him favorable treatment if he would testify(L.F.112).

The police conduct is similar to that in *Reasonover, supra* at 965. There, the state claimed that Reasonover confessed to another inmate, Rose Joliff. *Id*. at 964. Joliff was in the cell with Reasonover and Maquita Hinton. *Id*. Shortly after Hinton's release from jail, she met authorities from the St. Louis County

[3] The State argues that Edwards is biased and not credible(Resp.Br.32-33,n.10). That is a matter for a hearing. As in *Reasonover*, inmate witnesses can be found credible, especially when taped conversations corroborate that police engage in such tactics as alleged here.

Prosecutor's Office. *Id*. at 965. Captain Dan Chapman offered Hinton money if she would say that Reasonover confessed to the Vicker's murder. *Id*. Police told Hinton they could lock her back up if she did not cooperate. *Id*. They gave her details to use in her statement, including names of others involved. *Id*. Hinton decided not to cooperate and did not testify at trial. *Id*. A tape of the police conversation with Hinton corroborated Hinton's testimony. *Id*.

After hearing this evidence, the district court found Hinton credible. *Id*. at 966. This evidence would have impeached Joliff's testimony that Reasonover confessed to her while in the cell together. *Id*. "Hinton's credible account of how the police treated her is significant in light of the fact that Jolliff was dealing with the same officers at the same point in the investigation." *Id*. Hinton's testimony provided "strong evidence" that police gave Jolliff incriminating details to use in her testimony against Reasonover and may have promised or given money in exchange for her testimony. *Id*.

As in *Reasonover*, here, the alleged police conduct would have provided "strong evidence" that police gave Cole incriminating details to use against Mr. Williams. The defense maintained that Cole lied and manufactured claims against Mr. Williams for his own gain. Cole had read about the crime in the newspaper, but reported details about the crime that did not appear in the newspaper(Tr.2831-2847). The tactics by the police would have established how Cole learned of these details.

Since all of these allegations were specific, not general, this Court should remand for a hearing on these claims.

C. Postconviction v. Direct Appeal

The State suggests that Mr. Williams should have raised his claims of prosecutorial misconduct on direct appeal(Resp.Br.39-40).[4] Some discovery violations could have been raised on direct appeal.

Discovery Violations at Trial

- Statements by Defendant to John Duncan - letter to the prosecutor's investigator not disclosed until trial(Tr.1790-95);
- Statements by Defendant to Cole - not disclosed until trial(Tr.2450-53);
- Statements by Defendant to Mathieu Hose – not disclosed until witness testified(Tr.2619-21);
- Note written by Defendant – Cole gave to police, but not disclosed until after witness testified and was released from his subpoena (Tr.2564,2589,2600-2610);

[4] The State cites *State v. Suter*, 931 S.W.2d 856, 871(Mo.App.W.D.1996) for the proposition that where postconviction claims could have been raised on direct appeal but were not, they were waived(Resp.Br.40) The State ignores that *Suter* has been abrogated by *Deck v. State*, 68 S.W.3d 418(Mo.banc2002).

- Asaro claimed that she was threatened with a gun and told not to go to court - prosecutor and police knew about threats two nights before Asaro testified, but did not disclose them before trial(Tr.1874-80);
- Cole claimed he was threatened - not disclosed before trial(Tr.2557-58)[5];
- Police Experiment at Crime Scene – Squeaky Floors – Larner and police go to crime scene 3 weeks before trial, but fail to prepare a report or provide counsel with discovery(Tr.2073).[6]

Many of these claims may have provided grounds for reversal on direct appeal. *State v. Scott*, 943 S.W.2d 730, 739(Mo.App.W.D.1997).

However, just because the prosecutor committed many discovery violations that were exposed at trial, does not mean that Mr. Williams cannot raise other claims in his postconviction action. The relevant inquiry is whether the violation

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[5] At trial, the State elicited testimony, like alleged threats, that had not been disclosed. After the jury heard the prejudicial testimony, the trial court ordered it stricken. However, the bell could not be unrung and the State continued to argue the stricken testimony for the truth. The State continues these tactics on appeal, referring to the stricken testimony in its brief(Resp.Br.29,n.5).

[6] Given all these discovery violations, the State's assertion that it complied with all discovery requests and did not withhold documents or information from defense counsel(Resp.Br.27-28) must be rejected.

was brought to the trial court's attention, and thus the trial court's ruling on the violation could be raised on direct appeal.

The State had a duty to disclose exculpatory material, independent of defense counsel's duty to investigate. *Brady, Kyles* and *Strickler, supra*. The prosecutor opened his file and claimed to have disclosed all relevant material. The State's "open file" policy is a factor that "explains why trial counsel did not advance a *Brady* claim." *Banks v. Dretke*, 540 U.S. 668, 693(2004). To the extent the Brady violations were not brought to the trial court's attention, they could not have been raised on direct appeal, but had to be raised in postconviction proceedings. *Cf. State v. Phillips*, 940 S.W.2d 512(Mo.banc1997)(state's failure to disclose tape of a witness interview held by police was a *Brady* violation, properly litigated in postconviction proceeding).

The State's argument that Mr. Williams must raise *Brady* violations on direct appeal is akin to the State's argument in *Banks v. Dretke*, *supra*. There, the State urged that "the prosecution can lie and conceal and the prisoner still has the burden . . . to discover the evidence." *Banks*, 540 U.S. at 696. The Supreme Court rejected this argument. "A rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Id*.

Mr. Williams raised factually specific claims of prosecutorial misconduct. The motion court clearly erred in denying, without a hearing, these claims. Accordingly, this Court should reverse and remand for an evidentiary hearing.

II. Henry Cole: Jailhouse Informant

The failure to impeach a snitch witness can constitute ineffective assistance of counsel, especially when the witness is essential for a conviction; the amended motion pled facts, not conclusions, that included admissible impeaching material; and the motion established how Cole's background records would have been impeaching.

A. Failure to Impeach A Snitch Can Constitute Ineffective Assistance

The State did not have any physical evidence at the crime scene implicating Mr. Williams. No blood evidence, hair, fibers, or fingerprints. He had not confessed to police. Rather, the State's case relied on a jailhouse snitch and Mr. Williams' girlfriend; both claimed Mr. Williams confessed to the murder. Despite their importance, the State suggests that the failure to impeach these witnesses cannot be ineffective assistance of counsel, as the impeachment would not have provided a viable defense or changed the outcome of trial(Resp. Br. at 44).

Perhaps the State should consult with Verneal Jimerson about the importance of snitch testimony. Mr. Jimerson was convicted in 1985 of a double murder in Chicago, based on the testimony of a purported accomplice, Paula Gray. *See*, "The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row," A Center on Wrongful Convictions Survey, Winter 2004-2005, Northwestern University School of Law, at 4, located on line at: www.law.northwestern.edu/wrongfulconvictions (A-1-A-16). Ten years later,

the actual killers confessed and DNA testing corroborated these confessions. *Id*. Jimerson and his codefendants were set free. *Id*. In 1999, Cook County agreed to pay $36 million to settle lawsuits filed on behalf of Jimerson and his three codefendants. *Id*.

Randy Steidl also was convicted and sentenced to die based on the testimony of two informants, who claimed to witness the killing. *Id*. at 5. Only extensive investigation revealed that these two informants were lying and did not witness the crime. *Id*.

Many more case examples highlight the importance of snitch testimony. According to the Center on Wrongful Convictions, snitches are the leading cause of wrongful convictions in U.S. capital cases. *Id*. at 3. Of 111 exonerations since capital punishment was resumed in the 1970s, snitch cases account for 45.9% of the wrongful convictions. *Id*. Thus, when a case relies on snitch testimony, it is incumbent upon trial counsel to thoroughly investigate the snitch. That did not happen in Mr. Williams' case and contrary to the State's assertion, the failure can and should constitute constitutionally ineffective assistance of counsel.[7]

[7] The State's argument that the failure to impeach cannot constitute ineffective assistance(Resp.Br.44) is refuted by numerous cases cited in appellant's original brief, including *Black v. State*, 151 S.W.3d 49(Mo.banc 2004).

Claims Pled Admissible Facts, Not Conclusions

Mr. Williams' amended motion alleged that counsel failed to investigate Cole's family and failed to investigate Cole's mental illness, through Cole's family, background records and experts(L.F.75-78-121-51). The State focuses on Cole's past misconduct occurring years before the crime and says few of the allegations had to do with the facts of this case or Cole's specific interest to testify in this case(Resp.Br.43,45-46).

However, prior false allegations are admissible to impeach a witness. *State v. Long*, 140 S.W.3d 27(Mo.banc2004). Contrary to the State's assertion that *Long* is limited to the facts of that case(Resp.Br.48), this Court specifically ruled: "a criminal defendant in Missouri may, in some cases, introduce extrinsic evidence of prior false allegations. *This rule is not limited to sexual assault or rape cases*." *Id*. at 31(emphasis added). Cole's credibility was a key factor in determining Mr. Williams' guilt or acquittal, thus, excluding extrinsic evidence of the witness' prior false allegations deprived the fact-finder of evidence that is highly relevant to a crucial issue directly in controversy, the credibility of the witness. *Id*. at 30-31.

Surely the State cannot maintain that jurors would not have wanted to know that Cole's own son, daughter, and nephews believed that he was fabricating his story against Mr. Williams. Cole wrote to his son Johnifer while he was in jail with Mr. Williams, bragged that he had a "caper going on" and something big was

coming(L.F.128). Johnifer knew that his father was making false allegations for the reward money(L.F.126-29).

Similarly, Cole's daughter, Bridget, knew that Cole made false allegations in the past and had a reputation of providing false information to the police in exchange for leniency(L.F.129-130). Ronnie and Durwin Cole, Henry's nephews, confirmed that Cole had made false allegations(L.F.132,135). Cole often lied about others and then left town(Tr.132,135).

The State admits that the motion alleged that Cole was not afraid of Mr. Williams' family as he testified at trial; Cole went to New York because he was HIV-positive, contrary to his trial testimony that he fled because he feared Mr. Williams; and Cole told family when he was jailed with Mr. Williams, that he had something big coming(Resp.Br.46). However, the State concludes that this had very little impeachment value(Resp.Br.46).

The State ignores the prosecutor's closing argument in assessing the impeachment value. Cole and Asaro were the State's entire case and their credibility was critical to a conviction. The prosecutor told jurors that Cole payed a price for coming forward, "he had to move to New York"(Tr. 3011). In fact, Cole had not paid a price, he did not flee to New York because he felt threatened by Mr. Williams and his family, but had planned to go there for other reasons. The prosecutor commented on how defense counsel nit picked details like whether police gave Cole potato chips, but did not cross-examine Cole on anything important(Tr.3022). The prosecutor thought it was "just amazing" how consistent

Cole had been all the way through(Tr.3023). He told the jury, "I don't know what his [Cole's] motivations are. I could care less about that reward."(Tr.3058). Yet the jury should have know what Cole's motivations were and that he cared very much about the reward - - it set his "caper" in motion and he admitted as much in writing to his son. This is not some minor impeachment point, but goes to the heart of whether jurors should believe Cole or not, it goes to his motive to lie. A witness' bias and motive to lie is always admissible and relevant. *State v. Ofield*, 635 S.W.2d 73, 75(Mo.App.W.D.1982).

Cole's Mental Illness Relevant to Impeach

According to the State, Mr. Williams' amended motion did not plead sufficient facts to show that he was entitled to a hearing regarding counsel's ineffectiveness in failing to investigate Cole's mental problems(Resp.Br.50-51). The State says Mr. Williams had to specifically identify the information that would be contained in his treatment records(Resp.Br.50). The State cites, *State v. Taylor*, 134 S.W.3d 21, 26-27(Mo.banc2004); *State v. Goodwin*, 65 S.W.3d 17 (Mo.App.S.D.2001); and *State v. Seiter*, 949 S.W.2d 218(Mo.App.E.D.1997) (Resp.Br.51-54). These cases hold that a defendant is not entitled to information on the "mere possibility" that it might be helpful, but must make some plausible showing how the information would have been material and favorable. *Taylor*, *supra* at 26. Thus, an allegation that records "might" have a bearing on a witness' competency to testify, not supported by fact, was insufficient to find the trial court's denial of discovery an abuse of discretion. *Id*. at 26-27.

In *Seiter*, the defendant was convicted of sodomy and rape of a child less than 14. 949 S.W.2d 218. Counsel subpoenaed the records of a social worker and psychologist for the production of "any and all reports, treatment files, documents, personal notes, recording or other documentation regarding treatment or counseling of the victim or her mother." *Id*. at 220. Counsel also requested all the school records. *Id*. The basis for the request: the included "possible exculpatory" and "possible impeachment evidence." *Id*. The defendant was not entitled to records which might "possibly" be exculpatory and impeaching. *Id*. at 221. He must allege specific facts showing how the records would be helpful. *Id*.

Goodwin also was convicted of statutory rape. 65 S.W.3d at 19. His counsel requested hospital records, but the record on appeal was inadequate to find trial court error. *Id*. at 20. Appellant did not provide an order overruling the request for records and nothing indicated the subpoena was quashed. *Id*. The Goodwin court did reiterate the rule that a defendant is not entitled to information on the "mere possibility" that it might be helpful. *Id*. at 21.

Here, Mr. Williams alleged more than a mere possibility that Cole's mental health records would have provided impeaching information. Cole's family described Cole's mental problems(L.F.133-34). Cole hallucinated, seeing bugs in his glass when they were not there(L.F.134). He heard voices(L.F.133-34). They witnessed Cole's crazy and bizarre behavior(L.F.136). Doctors prescribed antipsychotic medication, but Cole did not regularly it(L.F.133). Cole's mental illness was debilitating, causing him to receive disability benefits(L.F.133,147).

A Circuit Court in the City of St. Louis had sufficient concerns about Cole's mental fitness to proceed that it ordered a psychiatric evaluation(L.F.139-50). Cole hallucinated and experienced memory loss(L.F.146). He was hospitalized at Hopewell Mental Health Center for mental illness(L.F.146-47). His treatment continued during the 1990s, near the time of his allegations against Mr. Williams(L.F.147).

Mr. Williams' allegations did not end there. He retained Dr. Cross who reviewed Cole's symptoms, finding them consistent with a mood disorder with psychotic features, such as Schizophrenia, Major Depression, and Affective Disorder(L.F.148). The doctor identified psychotic episodes(L.F.148). Cole's prior history of lying and fabricating evidence was part and parcel of his mental illness(L.F.147).

Thus, unlike *Taylor, Seiter*, and *Goodwin*, Mr. Williams' alleged specific facts showing Cole's mental illness and identified specific, impeaching information, such as hallucinations and memory loss. See *State v. Robinson*, 835 S.W.2d 303, 306-07(Mo.banc1992); *State v. Newton*, 925 S.W.2d 468(Mo.App. E.D.1996). A witness' paranoia and schizophrenia are relevant for impeachment. *United States v. Jimenez*, 256 F.3d 330, 343-44(5thCir.2001). Hallucinations are highly relevant to determine competency and a witness' ability to observe what happened. *Newton, supra* at 471. Mental illness can affect a witness' memory. *State v. Pinkus*, 550 S.W.2d 829, 839-40(Mo.App.S.D.1977).

These specific allegations required an evidentiary hearing. This Court should reverse and remand for such a hearing.

III. Ineffective Assistance-Failing to Investigate Laura Asaro

The amended motion included facts, admissible to impeach Asaro; counsel had a duty to conduct a reasonable investigation; Mr. Williams' car was important to the State's case; and an evidentiary hearing is necessary to determine if trial counsel had a reasonable trial strategy for not investigating physical evidence tying Asaro to the crime.

A. Amended Motion Included Facts Admissible to Impeach Asaro

Williams amended motion alleged that counsel unreasonably failed to investigate Asaro and discover impeaching evidence. The motion revealed Asaro was a drug addict, prostitute and bad mother(Resp.Br.57). But the motion also outlined how Asaro admitted setting Mr. Williams up to get the $10,000 reward, had a motive to lie as she was addicted to drugs and needed crack cocaine, and had made prior false accusations for money or drugs(L.F.78-79,151-57). The State suggests that since some of this evidence was inadmissible, none of the evidence was admissible(Resp.Br.57-58). The State even claims that Asaro's admissions to witnesses that she was "setting up" Mr. Williams to get the reward money were insufficient because the motion did not allege that Asaro told the witnesses that her testimony was "false"(Resp.Br.59). The State's arguments must be rejected.

The allegations that Asaro admitted setting up Mr. Williams so that she could get the reward money would have provided her motive for lying. *Ofield, supra*. Further, at trial, Asaro claimed that the reward was not important to her,

but rather she came forward for the victim and her family and because it was the right thing to do(Tr.1972-73). The prosecutor argued that Asaro was credible and the jury should believe her(Tr.3023-24,3054,3068). He told jurors that she did not want the reward(Tr.3068). How different would the jurors' view of Asaro been had they heard her bragging about setting her boyfriend up to get the reward money?

The amended motion alleged that Asaro was a paid informant, and had provided false information to police on other occasions(L.F.153-54,156). The witnesses knew Asaro had sex with police officers in exchange for money(L.F.153,156). Prior to her testimony against Mr. Williams, police came to her house frequently(L.F.155). This was not simply bad character evidence as the State suggests(Resp.Br.57-58). Rather, it goes directly to the truthfulness of Asaro's testimony that she had limited contact with the police(Tr.1923-24,1928,1978-79) and her motivations for providing information against Mr. Williams.

B. Counsel Has A Duty to Conduct A Reasonable Investigation

The State suggests that counsel is required to interview only those witnesses identified by their client(Resp.Br.58). However, regardless of what a client (who is not a lawyer) may tell counsel, counsel must act reasonably under the circumstances and conduct a reasonable investigation. *Hutchison v. State*, 150 S.W.3d 292, 304(Mo.banc2004). The State's citation to *Hutchison* for the proposition that-counsel must "know" about a witness before he will be found

ineffective-(Resp.Br.58) is contrary to that opinion. This Court found that "to prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that trial counsel knew *or should have known* of the existence of the witness." *Id*. (emphasis added). The State ignores the "should have known" part of this Court's analysis in *Hutchison*. The State also ignores *Wiggins v. Smith*, 539 U.S. 510, 527(2003); and *State v. Butler*, 951 S.W.2d 600,608(Mo.banc1997) discussing the duty to investigate independent of the client.

C. Williams' Car Was Important to State's Case

The State's two key witnesses, Asaro and Cole gave inconsistent accounts on some very important facts. Asaro claimed that Mr. Williams drove his car on the day of the murder and dropped her off at her mother's house(Tr.1841). Later, Mr. Williams supposedly picked her up in the car and used the car to dispose of his bloody clothes(Tr.1841,1844-45,1860,1869). In contrast, Cole said that Mr. Williams used a bus to go to the crime scene and commit the murder(Tr.2392, 2401). Rather than deal with the inconsistencies, the State combines the witnesses' two versions in its statement of facts in an effort to distort the record (Resp.Br.11,15,60).

Evidence that Williams' car was not operable was critical to show that Asaro was lying when she said he used his car to commit the murder and to dispose of incriminating evidence. That Asaro had keys to the car and got into the

trunk while Williams was in jail was important to show her involvement in the crime and opportunity to plant evidence against him.

D. Speculation Regarding Counsel's Trial Strategy

In responding to counsel's alleged ineffectiveness for failing to test Asaro's blood, hair and fingerprints to connect her to the crime scene, the State speculates that counsel made the strategic decision to focus on the State's failure to conduct the testing and did not want to run the risk of the tests proving Asaro was not involved in the murder(Resp.Br.65-66). However, without a hearing, the State is speculating on why counsel failed to conduct this testing. A remand is necessary to determine these claims. They should be granted or denied based on evidence, not speculation by the parties.

IV. Discovery in A Rule 29.15 Proceeding

A prosecutor has a duty to disclose records not in his actual possession, including police reports, mental health records and corrections records; and a witness' interest in maintaining confidentiality must be balanced with an accused's constitutional rights to confront the witness, present a defense and receive a fair trial and the witness can waive her rights by testifying about matters on direct.

A. Prosecutor's Duty To Disclose

The State argues the prosecutor had no duty to disclose items not in its physical possession(Resp.Br.67-68,70-71,72). The prosecutor said he had no police reports of the search of Mr. Williams' car, so that should end the matter, according to the State(Resp.Br.72). But as discussed in Point I, the prosecutor is responsible for impeaching materials known to others acting on the government's behalf, including the police. *Strickler* and *Kyles*, *supra*.

The State acknowledges police reports of another murder investigation with similarities to the charged offense, but again claims Mr. Williams is not entitled to them(Resp.Br.71). Even though post-conviction counsel requested these reports before the amended was filed and did not receive them, counsel needed to include a claim in the amended in order to be entitled to the records. *Id*. The State thus advocates a Catch-22, where a motion court can deny discovery necessary to

investigate and specifically plead claims, and later claim no discovery violation because the claim was not specifically pled.

Similarly, the State says the prosecutor has no duty to disclose its witnesses' mental health records, documents it did not have in its physical possession(Resp.Br.70-71). The State ignores this Court's decision in *State v. Robinson*, 835 S.W.2d 303(Mo.banc1992), holding otherwise, and relies on *State v. Stewart*, 18 S.W.3d 75(Mo.App.E.D.2000). *Stewart* does not help the State's position.

There, the defendant wanted numerous records, including records of patients who tested positive for HIV at Barnes-Jewish Hospital, DFS reports regarding possible abuse by the victim's mother, psychological records of the victim's mother and medical records of the victim's siblings. *Id*. at 93-94. As to the mother's psychological records, the Court ruled that the proper procedure for protecting confidentiality and defendant's due process rights was for the trial court to conduct an *in camera* review. *Id*. at 94. As for the siblings' records and the other patients' medical records, the defendant had not even requested an *in camera* review. *Id*. at 93, n.8, 94. As for the DFS records, the defendant failed to allege any facts or offer any evidence showing the basis for his belief that the Division conducted an investigation or that such reports existed. *Id*. at 93.

In contrast, Mr. Williams specifically requested the court conduct an *in camera* review as an alternative to full disclosure(L.F.470). The motion court knew this was an appropriate remedy, as it conducted the review on remand in

State v. Newton, 925 S.W.2d 468(Mo.App.E.D.1996). Yet the court denied all requests for discovery and refused to review any of the material *in camera* (L.F.390,403,750-55).

Similarly, the State's reliance on *State v. Bucklew*, 973 S.W.2d 83, 92 (Mo.banc1998) is misplaced(Resp.Br.70-71). In *Bucklew*, this Court found no discovery violation when a witness testified about a threat by defendant where the prosecutor had heard about the threat for the first time when the witness testified. *Id*. The State has no duty to disclose what it does not have. *Id*. In *Bucklew*, no one acting on the government's behalf, like the police or other state agency, had the statement.

The State never addresses whether Mr. Williams was entitled to the correction records of the State's witnesses as provided by *Carriger v. Stewart*, 132 F.3d 463, 479-82(9thCir.1997). Here, the amended motion alleged that both witnesses had been informants in past cases and Cole testified against others while he was in prison. Thus, their correction records should have been disclosed.

Witnesses' Rights Must Be Balanced Against Accused's Rights

Mr. Williams understands that courts must balance his constitutional rights with witnesses' rights. Yet the State advocates no balancing at all, saying a witnesses' mental health records are confidential(Resp.Br.68,71). *Stewart, supra*, shows that courts can balance the two with an *in camera* review.

Additionally, Asaro waived her privilege by testifying to her drug treatment at trial, something the State never addresses on appeal. Asaro admitted that she

was addicted to crack cocaine and that explained why her videotaped statement was not as accurate as her trial testimony(Tr.1904,1915). Asaro claimed that since she was in a recovery program, she could think more clearly and her memory had improved(Tr.1915,1917). The defense had a right to her drug treatment records, since Asaro testified about her treatment on direct and claimed it explained the discrepancies in her testimony and previous statements.

The motion court abused its discretion in denying Mr. Williams discovery. This Court should remand with instructions to the court to order disclosure of this material, or alternatively conduct an *in camera* review of privileged material, so that all relevant evidence can be presented at an evidentiary hearing.

VI. Counsel Ineffective For Failing to Offer Limiting Instruction

Evidence of other crimes is different from the failure to testify; MAI-CR3d 310.12 is mandatory if requested; and the record shows that trial counsel wanted to offer the instruction, but neglected to do so.

Evidence of Other Crimes v. No Adverse Inference Instruction

Mr. Williams alleged counsel was ineffective for failing to submit a limiting instruction, MAI-CR3d 310.12, on other crimes evidence that he attempted to escape from jail and assaulted a guard(L.F.87,201-04). The Pennsylvania Supreme Court reversed a murder conviction for the failure to submit such an instruction. *Comm. v. Billa*, 555 A.2d 835, 842-43(Pa.1989). The State never addresses *Billa*, but relies on *Winfield v. State*, 93 S.W.3d 737 (Mo.banc2002) and *Barnett v. State*, 103 S.W.3d. 765, 771(Mo.banc2003) to argue such an instruction is not required(Resp.Br.84-85).

Winfield and *Barnett* do not apply. In both cases no claim of ineffective assistance of counsel for failing to offer an instruction was pled in the postconviction motion. *Winfield, supra* at 737; and *Barnett, supra* at 773. Rather, the claims were raised for the first time on appeal. *Id*. Since the claim was not presented to the motion court, it was waived. *Id*.

Additionally, those cases dealt with counsel's failure to submit a no-adverse inference instruction at the sentencing phase. This Court refused to find that counsel was *per se* ineffective in such a situation, as counsel might reasonably

decide not to highlight the defendant's decision not to testify. *Barnett, supra* at 773.

Here, in contrast, the State introduced evidence[8] of other crimes, an attempted escape and assault of a guard, in guilt phase, through its two final witnesses(Tr.2615-72,2673-97). Captain Schiller witnessed the event and claimed[9] that Williams assaulted Officer Leslie and attempted to hit Schiller (Tr.2673-75). The State then argued this testimony it its closing, saying:

> Whacked that man right over the head. Did he care if he killed that man? I think that Officer Harrison was damn lucky he's alive, being hit over the head with this. Whack, and then swung the bar. Damn lucky, don't you think?

(Tr.3057). Thus, the failure to submit a limiting instruction under these facts cannot be compared to the failure to submit a no-adverse inference instruction, where counsel might not want to draw the jury's attention to the defendant's failure to testify.

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[8] Again, the State's brief improperly relies on evidence that the trial court excluded – that Williams supposedly wanted to kill the guard(Tr.2619-21)(Resp.Br.81).

[9] This testimony differed from the police report of the incident where other officers reported Schiller as identifying Quinton Davis as the attacker(Tr.2692-93,2693-95).

Instruction Is Mandatory If Requested

Contrary to the State's argument that the instruction is optional (Resp.Br.84),MAI-CR3d 310.12 must be given if requested by either party. See, Notes on Use, No. 2(App.A-17). Had counsel requested the instruction, the trial court would have submitted it.

Record Supports Claim of Ineffective Assistance

The State speculates that trial counsel must have made a strategic decision not to offer the instruction, without hearing counsel's testimony(Resp.Br.84). Such speculation is improper in any case, without a hearing, but is also refuted by the record. Counsel admitted in the new trial motion they wanted a limiting instruction and the failure to submit it prejudiced Williams(L.F.549). Therefore, this Court should remand for a hearing on this claim.

VII. Mitigation

The amended motion specifically identified family members, and the State fails to address counsel's failure to consult with and present psychological expert testimony, thereby conceding the merits of this claim.

The State inaccurately states that the amended motion referenced only "family members" and did not specifically identify them(Resp.Br.91). The record shows otherwise. The motion listed six witnesses, Williams' brother, Jimmy, his cousin, Latonia Hill, his grandfather, Walter Hill, his mother, Ella Williams Alexander, his Aunt Patricia Larue and himself(L.F.233-247). Additionally, the motion outlined each witness' testimony(L.F.235-48).

The State never even addresses counsel's failure to investigate and call a psychological expert such as Dr. Cross. The State's failure to respond to the merits should be viewed as a concession that the claim warrants a hearing.

As with other claims, the State speculates about counsel's strategy, opining that counsel did not present testimony of Mr. Williams' horrible childhood, because it was inconsistent with their trial strategy(Resp.Br.87-88,92). In support, the State selectively cites the record, where the trial attorneys indicated that the defense's primary theory was residual doubt(Resp.Br.88,citing H.Tr.46,93). However, the State ignores counsel's admission that he wanted to know everything about Mr. Williams before deciding his penalty phase strategy (L.F.831-32). Had he had time to investigate, counsel would have presented Dr.

Cross' testimony to explain Mr. Williams' prior criminal history(L.F.832). Since the jury already heard about the criminal history, counsel needed to present the mitigation from Mr. Williams' family and a qualified expert to mitigate the aggravators(L.F.832-33). Counsel did not believe this mitigation conflicted with his trial strategy of residual doubt and Mr. Williams' value to his family members. *Id*. Counsel believed Dr. Cross' testimony provided that compelling mitigation that could have saved Mr. Williams' life(L.F.833). The record supported counsel's admissions, as he informed the court, before trial, that he had not adequately prepared and needed more time to investigate mitigation(D.L.F.394-98,458-59,543).

The State also ignores its own argument at trial that mocked defense counsel's strategy to portray Mr. Williams as a good father, given his prior criminal history(Tr.3482-84,3486). The State cannot have it both ways, arguing that the defense theory was unreasonable at trial, but arguing its reasonableness on appeal.

This Court should give Mr. Williams the opportunity to establish counsel's ineffectiveness at a hearing, where findings are based on witnesses' testimony, not speculation.

XIII. Right to Reject Appointed Counsel

Rule 29.16(a) requires a motion court to make factual findings, on the record, as to whether Mr. Williams was competent to reject the appointment of counsel and did so understanding its legal consequences, and a reviewing court should not presume incompetence from a silent record.

A. 29.16(a) Requires Findings

Rule 29.16(a) contains mandatory language requiring that "the court ***shall*** find on the record, after a hearing if necessary, whether the movant is able to competently decide whether to accept or reject the appointment and whether the movant rejected the offer with the understanding of its legal consequences." (emphasis added). The court denied Mr. Williams' motions to reject counsel without making any findings(L.F.774). Despite this language, the State argues that this "purported deficiency" is not an impediment to the motion court's order denying Mr. Williams' request to reject counsel and proceed *pro se*(Resp.Br.125).

The plain language, "shall," is mandatory. *Hutchison v. Cannon*, 29 S.W.3d 844(Mo.App.S.D.2000). Courts are obligated to follow and apply the law as written. *State ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410 (Mo.App.E.D.2000). Statutory and rules' terms are to be given their plain and ordinary meaning. *Murray v. Missouri Highway and Transp. Com'n*, 37 S.W. 3d 228(Mo.banc2001). Here, the motion court failed to make the findings required by the rule, so a remand is necessary.

B. Reviewing Court Should Not Presume Incompetence From Silent Record

Normally, courts presume defendants are competent and will not find incompetence absent evidence to the contrary. *Cooper v. Oklahoma*, 517 U.S. 348(1996). The State turns this principle on its head, asking this Court to find that Mr. Williams is incompetent[10] to reject counsel, even though the motion court made no such findings(Resp.Br.126-28). Under the State's view, a movant would always be better off with counsel and could never understand the legal consequences of going *pro se*. *Id*. The State's reasoning would eliminate the constitutional right to represent oneself under *Faretta v. California*, 422 U.S. 806, 824(1975).

The State argues that Mr. Williams did not understand that *pro se* claims could not be considered if they were not included in the amended motion (Resp.Br.126). The State ignores that perhaps Mr. Williams wanted to proceed on his *pro se* claims, without the assistance of counsel, rather than on an amended motion, that the State maintains was so deficient not to warrant an evidentiary hearing.

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[10] If the State is willing to presume Williams is incompetent for purposes of Rule 29.16(a), perhaps it should concede his incompetence to be executed under the Eighth Amendment. *Ford v. Wainwright*, 477 U.S. 399, 428(1986). Appellant doubts the State would make that presumption, but would demand evidence and factual findings.

The State's relies on *Bittick v. State*, 105 S.W.3d 498, 503-04 (Mo.App.W.D.2003), for the proposition that the court properly denied Williams his right to reject counsel(Resp.Br.127-28). However, *Bittick* held a 29.15 litigant had the due process right to represent himself, extending *Faretta* to 29.15 proceedings. *Id*. It does not support the motion court's summary denial of Mr. Williams' right to go *pro se*, but rather, shows the error.

Since the motion court failed to comply with Rule 29.16(a), this Court should remand for findings, on the record, whether Mr. Williams is competent to reject counsel and that he did so understanding the legal consequences.

CONCLUSION

Based on Points I-XI of his original brief and his reply brief, Mr. Williams requests this Court reverse and remand for an evidentiary hearing; Point XII, a new penalty phase; Point XIII, a remand for further proceedings consistent with Rule 29.16.

Respectfully submitted,

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Certificate of Compliance and Service

I, Melinda K. Pendergraph, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,730 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in April, 2005. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 7th day of April, 2005, Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65102.

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Melinda K. Pendergraph